United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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76-7510/62

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FILED
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SECOND CIRCUIT

ELGIE & COMPANY,

Plaintiff-Appellant,

against

S.S. "S.A. NEDERBURG", her engines, boilers, etc., and SOUTH AFRICAN MARINE CORPORATION, LTD.,

Defendant-Appellee and Third-Party Plaintiff-Appellant,

against

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Third-Party Defendant-Appellee.

BRIEF FOR THIRD-PARTY DEFENDANT-APPELLEE

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TABLE OF AUTHORITIES

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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ELGIE & COMPANY,

Plaintiff-Appellant,
(Docket No. 76-7510)

- against -

S.S. "S.A. NEDERBURG", her engines, boilers, etc., and SOUTH AFRICAN MARINE CORPORATION, LTD.,

Defendant-Appellee and Third-Party Plaintiff-Appellant,
(Docket No. 76-7562)

- against -

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Third-Party Defendant-Appellee.

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STATEMENT

This case is again before this Court on the basis of an appeal from the decision on remand of the Court below. Third-party defendant-Appellee, INTERNATIONAL TERMINAL OPERATING CO., INC. ("ITO") will attempt to limit this brief to the issues covered in the opinion on remand. For the sake of

convenience, ITO incorporates by reference its brief filed in the original appeal to this Court.

Stated in its simplest terms, this case concerns one (1) piece of cargo out of a total shipment of twelve (12) pieces which were to be shipped from New York to Durban, South Africa. Pursuant to the instructions of the shipper, its freight forwarder arranged for the delivery of the cargo of optical equipment into the custody of defendant/appellee/appellant, SOUTH AFRICAN MARINE CORPORATION, LTD. ("Safmarine") (*J 134a - J 139a). Eleven (11) pieces of the shipment were loaded aboard a Safmarine vessel, the S.S. S.A. NEDERBURG, and ultimately delivered at the port of discharge, Durban. The remaining piece of cargo (the non-delivery of which gave rise to the subject action) was loaded aboard the S.S. S.A. MORGENSTER (Opinion on Remand, pp. 8 - 9), another vessel owned and operated by Safmarine (J 293a). Safmarine failed to explain, nor introduce any evidence relating to, the ultimate disposition of that missing piece.

It is ITO's position that this fact, in and of itself requires an affirmance of the decision of the Court below in which Safmarine was held <u>solely</u> liable to the plaintiff for the loss of the missing piece of cargo and which also denied any claim by Safmarine against ITO for indemnity or attorney's fees. (J 28a)

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* Reference is to pages in the Joint Appendix

QUESTION PRESENTED

Did the District Court err in holding that South African Marine Corporation, Ltd., was not entitled to indemnity or attorneys' fees from ITO (J 28a)?

POINT I

THE ULTIMATE RESPONSIBILITY FOR THE LOSS IN QUESTION MUST BE BORNE BY THE OCEAN CARRIER, SAFMARINE, SINCE THE CRATE THAT WAS LOST WAS LOADED ABOARD THEIR VESSEL

The case sub judice involves a shipment of eleven cartons and one crate of optical machinery (J 561a), which was to be carried from New York to Durban. The plaintiff-appellant, ELGIE & COMPANY ("Elgie") has alleged that one crate, containing an optical grinding machine, was never received at the port of discharge (J 4a - J 5a).

There has never been a dispute among the parties that eleven pieces of the subject shipment (J 561a) were loaded on board the S.S. S.A. NEDERBURG in March, 1974 and were thereafter delivered to the care and custody of Elgie at the port of discharge, Durban (J 7a - J 8a). With respect to the missing crate, however (J 6a) there had been an on-going dispute among Elgie, Safmarine and the third-party defendant, I.T.O., concerning the issue as to whether or not the missing crate was loaded on board another vessel, the S.S. S.A. MORGENSTER in March of 1974 (J 29a footnote #2, ITO Ex. H - J 622a).

This dispute was conclusively resolved by the

District Court in its opinion on remand:

> "Although seeing no need for the making of the factual determination, it is the conclusion of this Court, on the evidence presented, that the missing crate containing the generator was loaded upon the S.S. Morgenster. This finding is based upon the following facts:
>
> 1. The crate, along with the other parts, was delivered to the pier on March 13, 1974, and was receipted for under dock receipt 207. (See footnote 5, original opinion.)
>
> 2. The crate was too large to be pilfered.
>
> 3. The crate was of such a unique and limited use (the grinding of optical curves) that it is unlikely that anyone would have contrived to have it stolen using a large vehicle.
>
> 4. The crate was sufficiently large that, if it had been accidentally dropped overboard during loading, this would have been noted and remembered.
>
> 5. In addition to the tally sheet indication that one package from the shipment was loaded on the Morgenster, the testimony of the checker was that he had no question in his mind that the piece had gone aboard the Morgenster. (Record 430a)
>
> 6. A written notation on the ocean carrier's dock receipt indicated that 'Anthony' had advised that he then had stowage for only eleven pieces. (See footnote 9 of the Court's original opinion.)
>
> 7. The stevedore's records revealed that only eleven cartons were loaded aboard the S.A. Nederburg. (See footnote 5 original opinion.)

> Consequently, since the missing crate left the pier during the ten-day period in the middle of March, during which the Morgenster sailed, and since there is some evidence that a piece went aboard the Morgenster on March 15, 1974, and there is no other reasonable explanation for where it went, the Court finds that it was loaded and went forward on the Morgenster."
> (Opinion on Remand, pp. 8 - 9)

As a result of the aforesaid finding, Safmarine has radically changed its position from that originally alleged in its appellate main brief*. The juxtaposition is clearly evidenced by the heading of Point I in its brief on the second appeal to this Court following the opinion on remand of the court below** (Safmarine 2, p. 10), which states:

> "THE DISTRICT COURT'S FINDING THAT THE CRATE WENT FORWARD ON BOARD MORGENSTER IS FULLY SUPPORTED BY THE EVIDENCE."

Although Safmarine presently openly admits that the missing crate was loaded on board the S.S. S.A. MORGENSTER (Safmarine 2, p. 10), which was owned and operated by Safmarine (J 293a) and despite the fact that Safmarine never introduced any evidence as to the ultimate disposition of the missing crate (J 25a, J 33a), it is still seeking indemnity against ITO on the theory that the acts and/or omissions of ITO caused and/or contributed to the issuance of an erroneous

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* Main Brief submitted before oral argument in March, 1977 hereinafter referred to as Safmarine 1

** Brief on appeal following remand, hereinafter referred to as Safmarine 2

bill of lading (Safmarine 2, pp. 20 - 24).

Safmarine's theory of ITO's responsibility evidences a complete lack of understanding concerning the crucial issue of ultimate responsibility for the subject loss, since it overlooks the necessity of a causal relationship between the alleged acts and/or omissions of ITO and the proximate cause of the loss. Of even greater significance, however, is the holding of the District Court that the issuance of an erroneous bill of lading was not the proximate cause of the loss and its exculpation of ITO from all liability. The Court stated:

> "In the final analysis, we must conclude that both the ocean carrier and the stevedore were, to some degree, negligent and responsible for the issuance of the erroneous bill of lading. However, the burden of proof is on the ocean carrier to show that the stevedore breached its contract. See 17A C.J.S. Contracts §578. Moreover, since the terms of their contract limited the liability of the stevedore to fraud or negligence which causes the cargo loss, and since the ultimate loss was not due to the issuance of the erroneous bill of lading, it would appear that the ocean carrier has not met its burden of proving that the stevedore's negligence was the proximate cause of the loss." (J 26a - J 27a) (emphasis supplied)

Therefore, Safmarine's attempt to obtain indemnity from ITO on the grounds of either the issuance of an erroneous bill of lading or sloppy records (Opinion on Remand, p. 7) is clearly without basis, since the proximate cause of the loss was the failure of Safmarine, as a bailee of the cargo, to account for that shipment which was loaded aboard one of its vessels (J 25a, J 33a, J 293a).

Indeed, the ultimate responsibility of Safmarine is best summarized by Elgie in their original reply brief*, wherein it is stated:

> "Who could be in a better position to state that it believed that the cargo did not go on the 'Morgenster', and did not outturn from the 'Morgenster', than the steamship carrier itself, which had custody and control of the cargo? Had the one crate gone forward on the 'Morgenster' and been delivered to Elgie - even though it was under a false bill of lading- there would be no loss, and therefore, no lawsuit." (emphasis supplied)

The failure to account for the missing crate, as well as failure to establish that the alleged acts and/or omissions of ITO proximately caused the loss, require a denial of Safmarine's claim for indemnity against ITO. Such a holding is mandated whether the theory be negligence, Saugerties Bank v. Delaware & Hudson Co., 236 N.Y. 425 (1923),

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* Submitted before oral argument in March, 1977, hereinafter referred to as Elgie 2

or breach of workmanlike service, Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 76 S.Ct. 232 (1956); Garner v. Cities Service Tankers Corp., 456 F.2d 476 (5th Cir. 1972); LeBlanc v. Two-R Drilling Co., 527 F.2d 1316 (5th Cir. 1976).

The District Court's denial of Safmarine's application for indemnity against ITO should be affirmed.

POINT II

SAFMARINE'S REQUEST FOR ATTORNEYS' FEES SHOULD BE DENIED

In order to avoid unnecessary repetition, this point of law was completely discussed in ITO's main brief* and will not be repeated herein. In view of the total liability of Safmarine for the losses complained of (see Statement and Point I, supra) it is clear that the District Court acted properly in denying Safmarine's request for attorneys' fees as against ITO.

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* Submitted before oral argument in March, 1977, hereinafter referred to as ITO 1

CONCLUSION

THE JUDGMENT OF THE DISTRICT COURT SHOULD BE AFFIRMED WITH COSTS.

Respectfully submitted,

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~~Due and timely~~ service of Two copies
of the within Brief is hereby
admitted this 10th day of November 1975.

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AND THIRD PARTY PLAINTIFF-APPELLANT

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